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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 41

COMMERCIAL CREDIT COMPANY,
COMMERCIAL CREDIT CORPORATION, ETC.
ET AL.,

Appellants,

vs.

THE UNITED STATES OF AMERICA

Appellee.

Brief for Commercial Credit Company, Commercial Credit Corporation, Etc., Et Al.

OPINION BELOW

No opinion was delivered by the District Court either upon the entry of the original final decree or of the "Final Decree—In Modification." (R.117)

JURISDICTION

The statutory provisions that confer jurisdiction upon the Supreme Court to review the decree of the District Court upon a direct appeal are Section 2 of the Expediting Act of February 11, 1903, Chapter 544, 32 Stat. 823, as amended, 15 U.S.C. 29 reading as follows:

> "Sec. 2. In every suit in equity pending or hereafter brought in any district court of the United

> States under any of said Acts,* wherein the United States is complainant, including cases submitted but not yet decided, an appeal from the final decree of the district court will lie only to the Supreme Court and must be taken within sixty days from the entry thereof"

and Section 238 of the Judicial Code as amended, 42 Stat. 938, 28 U. S. C. 345 as follows:

> "A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following Acts or parts of Acts, and not otherwise:
>
> "(1) Section 2 of the Act of February 11, 1903, 'To expedite the hearing and determination' of certain suits brought by the United States under the antitrust or interstate commerce laws, and so forth."

The right of these Appellants to appeal is discussed in the Statement as to Jurisdiction heretofore filed in compliance with Rule 12 of this court and this court has found that probable jurisdiction exists.

QUESTION PRESENTED

Whether the United States District Court, sitting in equity, has the power to revise or modify a consent decree in the absence of a showing of new and unforseen conditions arising since the entry of the original decree. The Assignment of Errors (R.125) and the points on which these Appellants rely (R.133) show in detail the basis for the proposition argued.

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*An Act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1890, Expediting Act, Sec. 1.

STATUTES INVOLVED

The statutes involved are Sections 1 to 4 of an Act to Protect Trade and Commerce against Unlawful Restraint and Monopolies, approved July 2, 1890 as amended. The sections involved are:

"1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade of commerce among the several States, or with foreign nations, is hereby declared to be illegal: Provided, That nothing herein contained shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title, as amended and supplemented: Provided further, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and on conviction

thereof, shall be punished by fine not exceeding $5,000. or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. (As amended Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693).

2. Monopolizing trade a misdemeanor; penalty.

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by fine not exceeding $5,000., or by imprisonment, not exceeding one year, or by both said punishments, in the discretion of the court. (July 2, 1890, c. 647, Para. 2, 26 Stat. 209).

3. Trusts in Territories or District of Columbia illegal; combination a misdemeanor.

Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. (July 2, 1890, c. 647, para. 3, 26 Stat. 209.)

4. Jurisdiction of courts; duty of district attorneys; procedure.

The several district courts of the United States

are invested with jurisdiction to prevent and restrain violations of sections 1 to 7, inclusive, or section 15 of this chapter; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises. (July 2, 1890, c. 647, para. 4, 26 Stat. 209; Mar. 3, 1911, c. 231, para. 291, 36 Stat. 1167).

STATEMENT

This is an appeal from a final decree of the District Court of the United States for the Northern District of Indiana, South Bend Division, entitled "Final Decree—In Modification" dated December 21, 1940, modifying an earlier final decree by the same court which had been entered on November 15th, 1938 by consent of the parties in a suit in equity brought by the United States under Sections 1-4 of the Sherman Antitrust Act of July 2, 1890, Chapter 647, 26 Stat. 209, as amended, 15 U. S. C., Sections 1-4)

Paragraph 12 (R. 46) of the original final decree contained provisions restraining Appellants from making certain payments to any automobile manufacturing company and correspondingly restrained Chrysler Corporation, et al., (Appellants in Case No. 40) from obtaining payments or other things of value from finance companies, including these Appellants.

The second paragraph of Paragraph 12 of this decree provided as follows:

> "It is an express condition of this decree that notwithstanding the provisions of the preceding paragraph of this paragraph 12 and of any other provisions of this decree, if an effective final order or decree not subject to further review shall not have been entered on or before January 1, 1941, requiring General Motors Corporation permanently to divest itself of all ownership and control of General Motors Acceptance Corporation and of all interest therein, then and in that event, nothing in this decree shall preclude the Manufacturer from acquiring and retaining ownership of and/or control over or interest in any finance company, or from dealing with such finance company and with the dealers in the manner provided in this decree or in any order or modification or suspension thereof entered pursuant to paragraph 12a. The Court, upon application of the respondents, or any of them, will enter an order or decree to that effect at the foot of this decree, and the right of any respondent herein to make the application and to obtain such order or decree is expressly conceded and granted" (R. 46)

By a motion dated December 17, 1940 (R. 54) the United States asked the court to modify this provision of the final decree which by its terms was made an express condition of the decree, and by order dated December 21, 1940 (R. 117) the court on summary application, without the taking of testimony, granted the motion and signed the Final Decree—In Modification. The text of said Final Decree—In Modification is as follows:

> "*Final Decree—In Modification.*"
>
> "This matter came on to be heard by the Court on a motion of the United States for modification of the final decree, and the Court having heard argument

of counsel and having considered the matter, and it having appeared to the Court that allowance of such motion is just and equitable,

"Now, Therefore, It Is Ordered, Adjudicated and Decreed that the aforesaid final decree shall be and is hereby modified so that the second paragraph of section 12 thereof shall read as follows:

" 'It is an express condition of this decree that notwithstanding the provisions of the preceding paragraph of this paragraph 12 and of any other provisions of this decree, if an effective final order or decree not subject to further review shall not have been entered on or before January 1, 1942, requiring General Motors Corporation permanently to divest itself of all ownership and control of General Motors Acceptance Corporation and of all interest therein, then and in that event, nothing in this decree shall preclude the Manufacturer from acquiring and retaining ownership of and/or control over or interest in any finance company, or from dealing with such finance company and with the dealers in the manner provided in this decree or in any order of modification or suspension thereof entered pursuant to paragraph 12a. The Court, upon application of the respondents or any of them, will enter an order or decree to that effect at the foot of this decree, and the right of any respondent herein to make the application and to obtain such order or decree is expressly conceded and granted.

" 'And It Is Further Ordered, Adjudicated and Decreed that except as thus modified the decree as previously entered shall stand in full force and effect" (R. 117, 118)

SPECIFICATION OF ERRORS TO BE URGED

The District Court erred:

1. In making and entering the Final Decree—in Modification dated December 21, 1940.

2. In modifying the Final Decree dated November 15, 1938 without the acquiescence of the parties.

3. In failing to dismiss the motion for modification of the Final Decree.

4. In failing to make findings of fact and state conclusions of law.

SUMMARY OF ARGUMENT

I

The District Court, which, with the consent of all parties, entered a valid final decree enjoining the Appellants, has no power later to modify such decree unless there is definite proof clearly showing that such modification is legally proper and demanded by changed conditions, new and unforseen, arising after the entry of the original decree.

II

The conditions existing at the time of the entry of the original final decree have not changed.

ARGUMENT

I

United States vs. Swift & Company, et al., 286 U. S. 106, holds that federal District Courts exercising their equity jurisdiction have no authority to modify decrees entered by them, whether after litigation or by consent of the parties, unless the petitioner offers evidence that conditions have so changed since the entry of the original decree as to warrant the modification sought.

In the Swift Case, supra, this Court, in passing upon the power of the trial court to modify such a decree said at page 119:

> "There is need to keep in mind steadily the limits of inquiry proper to the case before us. We are not framing a decree. We are asking ourselves whether anything has happened that will justify us now in changing a decree. The injunction, whether right or wrong, is not subject to impeachment in its application to the conditions that existed at its making. We are not at liberty to reverse under the guise of readjusting. ***Nothing less than a clear showing of grievous wrong evoked by new and unforseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned."

In concluding its opinion in the Swift case the Court further said at page 120:

> "What was then solemnly adjudged as a final composition of an historic litigation will not lightly be undone at the suit of the offenders, and the composition held for nothing."

This principle was considered by the Court below, which questioned its authority to modify the decree without the taking of testimony. During the argument at the hearing, the Court expressed its doubt in the following manner:

> "The Court: Gentlemen, I wonder what authority the court has to take up a matter of this kind without a showing. There has been a petition filed, I take it, and a statement made by Mr. Ford as to the necessity for an extension of this order. Now, I am wondering whether, especially in view of the fact that counsel for the defense have challenged it, whether it must not of necessity be set down for a hearing and the taking of testimony, either by affidavit or oral testimony, as to the necessities. My suggestion before lunch was made with the hope that there might be

some way of counsel agreeing to the partial—to a continuance for a partial granting at least of what the Government is asking. I thought perhaps that you could agree that the order might be continued for one year, leaving it open then for application to be made at the expiration of a year, if it was thought that one side or the other is entitled to some relief, but if you don't want to agree to anything I think we will just absolutely have to set it down. I doubt very much—have you examined the authorities, Mr. Ford, on the right of the court to extend a provision of this kind?" (R. 106, 107)

That a decree should not be modified upon a mere motion supported only by affidavit and that evidence of changed conditions must be introduced to support such a motion is clear under the decision of this Court in the case of the *United States vs. International Harvester Company*, 274 U. S. 693, wherein the United States unsuccessfully sought the modification of a decree entered against the Harvester Company. In that case the United States attempted to show that the Harvester Company had not complied with the original decree ordering it to restore competitive conditions, by offering in evidence a report of the Federal Trade Commission unsupported by direct testimony bearing upon the contents of the report. In discussing the evidence introduced the Court said, at page 703:

"In support of its alternative contention that competitive conditions have not been established bringing about a situation in harmony with law, the Government relies in large measure upon various statements and tabulations contained in the report of the Federal Trade Commission, which was introduced in evidence over the objection of the International Company. But it is entirely plain that to treat the statements in this report—based upon an *ex parte* investigation and formulated in the manner hereinabove set forth—as constituting in

themselves substantive evidence upon the questions of fact here involved, violates the fundamental rules of evidence entitling the parties to a trial of issues of fact, not upon heresay, but upon the testimony of persons having first hand knowledge of the facts, who are produced as witnesses and are subject to the test of cross-examination***."

Similarly Appellants were entitled in the Court below to a hearing at which they could cross-examine witnesses produced by the United States in support of its motion to modify and might in turn introduce evidence to show that there had been no change in conditions since the entry of the original final decree.

It is clear therefore, that in a proceeding to modify a decree, whether entered at the close of a contested case or on consent of the parties, the burden is on the petitioner to establish that the continuance of the provisions of the decree sought to be modified would be inequitable and oppressive in view of changed conditions and the showing must be on proper proof. This the United States has not done. No evidence was introduced and no testimony taken. The Court below modified the original decree solely on the allegations contained in the motion to modify and the argument of counsel.

II

In the instant case there was no showing in the lower court of any change in conditions which would warrant a modification of the restraint included in paragraph 12 of the original final decree. The United States is not seeking to modify the instant decree because of any change in circumstances.

The decree restrained Chrysler Corporation et al (Appellants in Case No. 40) from doing certain things until January 1, 1941. Within a few days of the time

when the injunction would be lifted by reason of the passage of time, the United States sought to extend that time, not because of changed conditions, but simply because a final decree had not been entered against General Motors as provided in the original final decree.

There is some faint trace in the motion for modification (R. 55) and argument by counsel for the United States (R. 106, 112) that the parties to the consent decree erroneously miscalculated that the General Motors case would be disposed of quickly—that a mistake was made in setting the date for the lifting of the restraint.

It is problematical what was in the mind of counsel for the United States at the time when the date of January 1, 1941 was agreed upon. Certainly, there is no evidence at all that counsel for Chrysler Corporation and for Commercial Credit Company and their associates were under any misapprehension when they agreed to that date. The date was deliberately chosen and marked a definite period during which the Appellants agreed to the restraint of the original final decree despite the fact that General Motors Corporation, a competitor, was under no similar restraint during that time. It is submitted that when a time limit is deliberately set for the happening of an event, its failure to occur within the period is not a change in conditions which would warrant the Court in modifying the original final decree by extending the date at the suit of one party over the objection of the other. The situation is far different from that which exists when there are true economic and social changes, such as were involved in the *Swift* case.

The United States is in effect contending that the original final decree restrained the Appellants for too short a time and that the modification of the decree will correct this situation. In an earlier case also involving

Swift & Company, in which that Corporation unsuccessfully sought to vacate a consent decree entered against it, on the ground that the decree was too broad in scope, this Court observed (*Swift & Company et al vs. United States*, 276 U. S. 311 at page 331):

> "The power to enjoin includes the power to enjoin too much."

A fortiori, if the court has the power to enjoin too much, it has the power to enjoin too little, and the original decree, in the absence of a showing of changed conditions, should stand although the United States has now become dissatisfied with the period of the restraint. If counsel for the United States made a miscalculation in agreeing to the date set in Paragraph "12" of the original decree, that fact is not sufficient ground upon which to base a modification of the decree. Again in the earlier *Swift* case, the Court said, at page 331:

> "His authority (the Attorney-General) to make determinations includes the power to make erroneous decisions as well as correct ones."

However, there is no evidence at all that counsel for the United States made a miscalculation. The United States delayed for two years after the entry of the original decree in the instant case in filing a bill of complaint against General Motors (R. 79, 113) to accomplish what it desired in connection with that corporation. It would appear that delay upon the part of the United States, rather than miscalculation of time, has caused its present dissatisfaction with the restraint imposed by Paragraph 12.

CONCLUSION

The decree appealed from should be revised insofar as it modified the original final decree and the motion should be ordered dismissed with costs to the Appellants.

Respectfully submitted,

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